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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 22, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: **IB Docket No. 98-192; Direct Access to the INTELSAT System**

Dear Ms. Salas:

Enclosed for filing in IB Docket No. 98-192 you will find an original and eleven copies of "**Comments of ABC, Inc., CBS Corporation, National Broadcasting Company, Inc., and Turner Broadcasting System, Inc.**" Please date stamp the "stamp and return" copy of the comments for return by the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,


Randolph J. May

Enclosures

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	IB Docket No. 98-192
)	File No. 60-SAT-ISP-97
Direct Access to the)	
INTELSAT System)	

**COMMENTS OF ABC, INC., CBS CORPORATION, NATIONAL
BROADCASTING COMPANY, INC., AND TURNER
BROADCASTING SYSTEM, INC.**

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December 22, 1998

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TABLE OF CONTENTS

SUMMARY	ii
I. BACKGROUND	2
A. The Networks' Interest	2
B. The Commission's Proposal	4
II. DISCUSSION	7
A. The Competition Engendered By Level 3 Direct Access Will Benefit Users Of The INTELSAT System	7
B. In Determining That Public Interest Benefits Will Be Produced By Direct Access, The Commission Should Not Make This Proceeding Into A Rate Case To Determine The Reasonableness Of COMSAT's Mark-Up	9
C. The Commission Should Authorize Direct Access For Noncompetitive And Competitive Markets	13
D. The Commission Possesses The Legal Authority To Implement Direct Access	14
III. CONCLUSION	18

SUMMARY

ABC, Inc., CBS Corporation, National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. (collectively the "Networks") support the Commission's proposal to permit carriers and users to obtain Level 3 contractual access to the INTELSAT system. Implementation of the Commission's proposal will constitute another important step in promoting competition in the international satellite marketplace.

The Networks are major users of international satellite services, including the INTELSAT system, in connection with the operation of their broadcast and cable television networks. They use satellite services every day to bring fast-breaking news, sporting events, and other programming from around the world to the American public, and they also to export U.S. programming overseas. The Networks believe that the competition engendered by the availability of direct access will bring positive benefits to U.S. users of the international satellite services in the form of lower prices, better service quality, and greater operational flexibility. COMSAT's loss of monopoly access to the INTELSAT system for transmissions to or from U.S. points will create an incentive for it to reduce its current mark-up above the INTELSAT charge and improve its service quality.

As the Commission observes, 76 countries already permit Level 3 direct access. The Networks have found the availability of direct access abroad to offer the type of benefits that would be expected to result from increased competition. The U.S. should now join the countries which allow direct access in order to introduce further competition into one of the few remaining market segments in which a service provider retains by regulatory policy an exclusive right to provide a telecommunications service.

COMSAT's mark-up above the INTELSAT charge (IUC) for video services is quite high, but there is no need to turn this proceeding into a rate case to determine the reasonableness of COMSAT's claimed costs. Rather, the whole point of allowing direct access is to create a competitive situation in which COMSAT's costs, whatever they may be at present and however "reasonable" or not they may be claimed to be at present, are driven lower by virtue of marketplace competition. And the Commission should not minimize the importance of the cost savings that users will realize from direct access implementation merely because COMSAT may characterize such savings as not "significant" or "substantial."

Direct access should be implemented for markets the Commission has denominated as "noncompetitive" and "competitive." While the designation of markets as "competitive" may justify streamlined tariff regulation, users in "competitive" markets can benefit materially from the further competition direct access will provide.

Finally, the Networks concur in the Commission's comprehensive analysis of its legal authority to implement Level 3 contractual access. If the Commission were proposing Level 4 investment-type access, then some of the legal points raised by COMSAT

might warrant close consideration. But the Commission persuasively demonstrates that it possesses the statutory authority to implement Level 3 access and that doing so does not constitute a regulatory “taking” raising constitutional concerns.

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In the Matter of)
)
Direct Access to the)
INTELSAT System)

IB Docket No. 98-192 FEDERAL COMMUNICATIONS COMMISSION
File No. 60-SAT-ISP-97 OFFICE OF THE SECRETARY

**COMMENTS OF ABC, INC., CBS CORPORATION, NATIONAL
BROADCASTING COMPANY, INC., AND TURNER
BROADCASTING SYSTEM, INC.**

ABC, Inc., CBS Corporation, National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. (collectively the "Networks"), by their attorneys, hereby submit their comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.¹ In this proceeding, the Commission is proposing to permit carriers and users to obtain Level 3 direct access to the INTELSAT system. Level 3 direct access allows customers to enter into a contractual arrangement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rate that INTELSAT charges its signatories.² The Notice requests comment on the policy and legal issues pertinent to the Commission's tentative conclusion that Level 3 direct access should be permitted.

¹ Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280, released October 28, 1998 (hereinafter generally referred to as the "NPRM" or "Notice"). The NPRM was published at 63 Fed. Reg. 59755, November 5, 1998.

² NPRM, at para. 8. In contrast to Level 3 direct access, Level 4 direct access permits customers in INTELSAT member countries to make capital investments in INTELSAT in proportion to utilization of the INTELSAT system. *Id.*

I. BACKGROUND

A. The Networks' Interest

The Networks are major users of full-time and occasional international satellite services in connection with the operation of their broadcast and cable television networks. Every day the Networks use international satellite video and associated audio transmission services, including the INTELSAT system, to bring fast-breaking news, sporting events, and other programming from overseas to the American public. They also use international satellite services to export overseas U.S. news, entertainment, and sports programming. Of course, for program transmissions carried over INTELSAT satellites which originate or terminate directly in the United States, the Networks must utilize COMSAT's full-time and occasional video services.³

In light of their heavy reliance on international satellite services to operate their broadcast and cable television businesses, the Networks have participated actively in virtually every major satellite proceeding at the Commission for over two decades, including the initial Direct Access proceeding.⁴ Most recently, the Networks have participated in the proceedings

³ As discussed below, the Networks often use Teleglobe to receive occasional use transmissions carried on INTELSAT satellites. They then bring these transmissions from Canada to their network operations centers in the U.S., generally using terrestrial facilities. The Networks believe that the competitive spur provided by direct access should create a situation in which it may be more attractive than it is at present to terminate occasional use traffic destined for the U.S. at U.S. earth stations located close to their network operations centers.

⁴ Regulatory Policies Concerning Direct Access to INTELSAT Space Segment, 97 FCC 2d 296 (1984) (hereinafter "1984 Direct Access Order") (see references to the Networks' comments throughout the order).

concerning COMSAT's various requests for regulatory relief and the Commission's proposal to shift from a rate of return to an "incentive regulation" regime for COMSAT's dominant services.⁵

Over the years, there has been a persistent and fundamental theme at the core of the Networks' pleadings: users of communications services benefit from the introduction and enhancement of a competitive environment, and, concomitantly, as effective competition truly develops, then regulatory oversight may be relaxed. Thus, for example, in order to further a competitive environment with regard to international satellite services, the Networks have supported changes in policies which have allowed broadcasters and other users to take service from COMSAT without going through the international service carriers,⁶ allowed carriers to construct INTELSAT earth stations independent of COMSAT ownership and control,⁷ and allowed entities other than INTELSAT to provide international satellite service on a competitive

⁵ See, e.g., Comments of Networks, RM 7913, August 25, 1994; Comments of Networks, File No. 14-SAT-ISP-97, January 17, 1997; Comments of the Networks, File No. 60-SAT-ISP-97, June 16, 1997; Reply Comments of the Networks, File No. 60-SAT-ISP-97, July 18, 1997; Comments of the Networks, IB Docket No. 98-60, May 28, 1998; and Reply Comments of the Networks, IB Docket No. 98-60, June 12, 1998.

⁶ Spanish International Network, 70 FCC 2d 2127 (1978), aff'd sub nom. ITT World Communications v. FCC, 725 F.2d 732 (D.C. Cir. 1984); Modifications of the Commission's Authorized User Policy Concerning Access to International Satellite Services of the Communications Satellite Corporation, 90 FCC 2d 1394 (1982), vacated and remanded sub nom. ITT World Communications, Inc., 725 F.2d 732 (D.C. Cir. 1984), on remand, 100 FCC 2d 177 (1985), aff'd sub nom. Western Union Int'l, Inc. v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

⁷ Modification of Policy on Ownership and Operation of U.S. Earth Stations That Operate with the INTELSAT Global Communications System, 100 FCC 2d 250 (1984).

basis.⁸ In each of these instances, the Commission adopted a new policy which allowed a particular segment of the international services market to become more competitive.

B. The Commission's Proposal

The Commission explains that it is necessary and appropriate to consider direct access to INTELSAT services at this time for several reasons. First, since the 1984 Direct Access Order, INTELSAT itself has instituted a formal program permitting non-signatory direct access. Indeed, as a result of this change, the Commission points out that at least 76 countries now permit Level 3 direct access and 17 countries permit Level 4 direct access.⁹ Second, COMSAT's customers have expressed a desire to have a direct access option. And, finally, the Commission recently determined that COMSAT is dominant in 63 countries for switched voice and private line services and in 142 countries for occasional use video services. In these markets, "customers have no choice but to use COMSAT in obtaining satellite capacity for those services"¹⁰

As a matter of policy, the Commission observes that INTELSAT itself has identified the following benefits that direct access may offer customers:

- (1) improved responsiveness to customer inquiries on service implementation; (2) avoidance of mark-up costs charged to third parties; (3) greater control over service quality, performance costs, connectivity, redundancy, and earth station

⁸ Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985), on recon. 61 Rcd. Reg. 2d (P&F) 649 (1986), on further recon. 1 FCC Rcd. 439 (1986).

⁹ These countries are listed in Appendix A to the Notice.

¹⁰ NPRM, at para. 14.

capabilities; and (4) more flexibility (than through third parties) in tailoring services in terms of bandwidth, time duration, performance standard, redundancy and service applications.¹¹

The Commission concludes that “[t]he fact that 93 countries already permit some level of direct access may indicate international recognition of some of the benefits.”¹²

Noting COMSAT’s contention that direct access would not result in “significant cost savings” and that, as the U.S. investor in INTELSAT, it must be allowed to earn a return on its investment and recover its costs, the Commission requests comment “on whether as a matter of law and policy, Comsat should have an opportunity to recover any of the costs it currently recovers from its mark-up over the IUC, or whether the up to 21 percent return reflected in the IUC is already adequate to compensate Comsat for any such costs and still provide Comsat with a fair net return on its investment.”¹³ In light of Comsat’s ability to earn up to a 21 percent return in connection with direct access usage in the United States, the Commission requests comment “on whether the availability of Level 3 direct access might lead us to different conclusions than

¹¹ NPRM, at para. 44.

¹² NPRM, at para. 44.

¹³ NPRM, at para. 48. The INTELSAT utilization charge, or “IUC,” is INTELSAT’s charge to its signatories for space segment service. According to the Commission, the IUC has three components: (a) INTELSAT’s operating expenses; (b) depreciation of capital assets; and (c) a rate of return for use of Signatories’ capital. NPRM, at para. 47. The Commission points out that: “INTELSAT’s Level 3 direct access program assures Signatories of a return on investment (currently up to 21 percent) for all INTELSAT traffic attributable to direct access customers in their country. Thus, Comsat would receive up to a 21 percent return on its investment in INTELSAT space segment utilized by U.S. carriers and users under Level 3 direct access arrangements.” NPRM, at note 134.

we made in our 1984 Direct Access Order as to cost savings to customers.”¹⁴

The Commission also seeks comment concerning whether direct access should be authorized for markets it has designated competitive as well as those it has designated as non-competitive. The Commission asks parties to address “whether direct access to all markets would further increase the level of competition to the extent that prices to consumers would be likely to fall, even in competitive markets.”¹⁵

Finally, the NPRM sets forth an extensive legal analysis of the Commission’s authority to implement direct access.¹⁶ The Commission tentatively concludes that it possesses authority under the Satellite Act to permit carriers and users to obtain Level 3 direct access to INTELSAT.¹⁷ The Commission also tentatively concludes, again after undertaking a comprehensive legal analysis, that authorization of Level 3 direct access is not inconsistent with the Fifth Amendment. The Commission concludes that COMSAT has no vested property right with respect to its access to INTELSAT and, therefore, allowing Level 3 direct access would not constitute a “taking” requiring compensation under the Fifth Amendment.¹⁸

¹⁴ NPRM, at para. 49.

¹⁵ NPRM, at para. 54.

¹⁶ NPRM, paras. 16-43.

¹⁷ NPRM, para. 19. The Commission tentatively concludes that it does not possess authority under the present provisions of the Satellite Act to authorize carriers and users to obtain Level 4 direct access.

¹⁸ NPRM, para. 32.

II. DISCUSSION

A. The Competition Engendered By Level 3 Direct Access Will Benefit Users Of The INTELSAT System

ABC, CBS, NBC, and Turner believe that the competition brought about by direct access will bring positive benefits to U.S. users of the INTELSAT system in the form of lower prices, better service quality, and greater operational flexibility.¹⁹ Of course, this view should not be surprising because new or enhanced competition typically produces these benefits. The Commission has acknowledged the benefits of competition too many times to need recitation, and Congress's adoption of a "pro-competitive, deregulatory" national policy in enacting the Telecommunications Act of 1996 only underscores the point.²⁰

Yet COMSAT presently retains its role as the monopoly provider of INTELSAT space segment for transmissions originating or terminating directly in the United States, one of the few exclusive domains left in telecommunications markets today. Any user wishing to originate or terminate transmissions in the U.S. using INTELSAT satellites must place the order for the service through COMSAT, and contract with COMSAT, which then orders the capacity from INTELSAT. COMSAT provides no transmission facilities of its own; rather, in terms of space segment provision, COMSAT acts merely an intermediary between INTELSAT and the

¹⁹ In these comments, the Networks are advocating adoption only of Level 3 direct access.

²⁰ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

customer.²¹

It seems incongruous for the United States, which to its great credit has been the leading exponent in the world of the virtues of a competitive telecommunications paradigm, to be a laggard with regard to allowance of direct access. The Commission reports that 76 countries already permit Level 3 direct access.²² While many of these countries, listed in Appendix A, are rapidly privatizing their PTTs and otherwise introducing competition into their telecommunications environments, it is safe to say that very few, if any, can match the U.S.'s long commitment to the virtues of marketplace competition. The U.S. should now join the countries which allow direct access in order to introduce further competition into one of the few remaining market segments where a service provider retains by regulatory policy an exclusive right to provide a telecommunications service.

The Networks have found the availability of direct access abroad to offer benefits of the type that would be expected. For example, the Networks have used direct access in Great Britain to arrange short-term bookings for events such as Mother Teresa's funeral. In such instances, they report avoiding the British Telecom add-on fee, and they also report able

²¹ The Networks understand that COMSAT fulfills certain functions in its role as signatory. The above statement refers to COMSAT's intermediary role as provider of transmission capacity to the customer.

²² The Networks understand that Canada has now implemented Level 3 and Level 4 direct access.

assistance from INTELSAT in coordinating the operational arrangements for through circuits. Of course, the cost savings are more significant for longer bookings, making dealing directly with INTELSAT even more economical.

B. In Determining That Public Interest Benefits Will Be Produced By Direct Access, The Commission Should Not Make This Proceeding Into A Rate Case To Determine The Reasonableness of COMSAT's Mark-Up

As Appendix B to the Notice indicates, COMSAT's mark-up over the INTELSAT IUC rate is substantial. For example, for the standard occasional television service used principally for newsgathering and special events, COMSAT's mark-up over what it pays INTELSAT for the space capacity is 55%. For full-time video services, the markup typically is in the range of 25%-35%. On an overall basis, the Chief of the International Bureau estimated that in 1996 COMSAT's mark-up was 68% over its payments to INTELSAT for space segment.²³

The Commission points out that COMSAT claims that its mark-up over the IUC rate includes expenses such as "(a) signatory costs; (b) marketing/sales costs; (c) satellite insurance costs; (d) transactions costs; (e) operational costs; (f) regulatory compliance costs; and (g) taxes."²⁴ The Commission requests COMSAT to "specify the activities or transactions that give rise to these costs and the magnitude of these costs" and "specify which of these costs it

²³ Letter from Regina M. Keeney, Chief, International Bureau, FCC, to the Honorable Thomas Bliley, Chairman, Committee on Commerce, U.S. House of Representatives, December 22, 1997, at 10.

²⁴ NPRM, at para. 47.

believes should be added to the IUC to allow for fair recovery.”²⁵ Interested parties are invited to respond to the cost information that COMSAT provides.²⁶

Without doubt, COMSAT has certain costs of its own which it should have an *opportunity* to recover by a mark-up over the IUC rate.²⁷ In the Networks’ view, COMSAT’s mark-up as delineated above for video transmission services is quite high,²⁸ and quite likely we would disagree with COMSAT concerning the extent to which certain of its claimed costs are reasonable and necessary. For example, it is not clear on the face of it why most “satellite

²⁵ NPRM, at para. 47.

²⁶ NPRM, at 48. The Commission presumably contemplates that such response would occur in the reply round, assuming COMSAT provides this information in its initial comments.

²⁷ Even under traditional rate of return regulation, much less incentive regulation, a common carrier is given only an *opportunity* to earn a fair return, not *guaranteed* a fair return. See New England Tel. and Tel. Co. v. FCC, 826 F.2d 1101, 1108 (1987), *cert. denied*, Southern Bell Tel. & Tel. Co. v. FCC, 490 U.S. 1039 (1989), where the court stated that the Commission’s policy of not setting guaranteed minimum returns for carriers “is a reasonable one. Under the Act, the carriers have the opportunity and responsibility to file rates that provide an adequate return.” Or, as the Commission put it more recently, rate of return regulation adjusts prices “to allow LECs the opportunity to earn a pre-determined return” Price Cap Performance Review, Fourth Report and Order, 12 FCC Rcd 16642, 16646 (1997).

²⁸ For example, INTELSAT’s charge to signatories for standard occasional television service (18 MHZ) is \$6.50 per minute. COMSAT’s rate to its customers for the half space segment only is \$10.10, a mark-up of 55%. Teleglobe, the Canadian signatory to INTELSAT, charges its customers a total of \$8.50 (in U.S. dollars) per minute for *both* the half space segment and ground segment. Thus, Teleglobe’s rate is over 15% lower than COMSAT’s, and the ground segment is included! It is for this reason, along with attentiveness to service quality, that the Networks increasingly have used Teleglobe for some of their occasional television service. While COMSAT may contend that the Networks’ use of Teleglobe indicates that it confronts competition, the Networks do not agree that bringing down traffic in another country to obtain better service quality and lower rates for transmissions destined for the U.S. is an indication of an effectively competitive environment.

insurance costs” and “operational costs” are not already recovered in INTELSAT’s operating expenses, which is one of the cost components built into the IUC rate.

Nevertheless, the Networks submit the Commission should not allow this proceeding, in effect, to be turned into a rate case to examine the reasonableness of COMSAT’s own costs, say, for “marketing” or for “operations” or for “regulatory compliance.” Indeed, the whole point of allowing direct access is to create a competitive situation in which COMSAT’s costs, whatever they may be at present and however “reasonable” they may be claimed to be at present, are driven lower by virtue of marketplace competition. In other words, if direct access is authorized, it is not a question of whether COMSAT should be allowed an opportunity to achieve a fair recovery through a mark-up over the IUC. Like every carrier, it should be. But it is not unfair to COMSAT to allow it the opportunity to earn a fair return in a way that does not require the Commission to conduct a rate proceeding to determine the reasonableness of COMSAT’s marketing, operational, regulatory compliance, and other costs.²⁹

COMSAT apparently claims that direct access will not result in “significant cost

²⁹ The cost category which COMSAT identifies as “signatory costs” is of a somewhat different type than the other categories identified by COMSAT in that these costs are unique to COMSAT. Signatory costs are incurred by COMSAT in connection with the performance of its representational duties as the U.S. signatory to INTELSAT. The Commission has asked COMSAT to submit information concerning its signatory costs, and the Networks will review this information. COMSAT’s return on INTELSAT investment of up to 21% may well be adequate to compensate COMSAT for performance of its signatory duties. If the Commission determines that an additional amount should be charged users who bypass COMSAT, however, then it would be necessary to determine the reasonableness of COMSAT’s claimed signatory costs.

savings” and that customers will not “realize any meaningful savings.”³⁰ The Networks do not believe it is possible to know -- nor should it be -- the extent of the “cost savings” that may be realized by customers until the further competition engendered by direct access develops. Again, the point is to allow the additional competition which does develop to wring out whatever cost savings may be achieved, not to argue about the level of COMSAT’s costs in a rate case-like proceeding.

The Networks emphasize that from their perspective, particularly in this time of an increasingly competitive environment, any cost savings realized are desirable, whether or not COMSAT, or anyone else, may choose to characterize such savings as “significant” or “meaningful.” In this regard, the Networks point out that in the 1984 Direct Access Order, the Commission itself seemed to minimize the importance to customers of cost savings that somehow were not denominated as “*significant*.” Throughout its order, the Commission questioned whether direct access would produce “**significant** economic savings,”³¹ whether “any savings in this area could exceed *a few percentage points* of the total cost,”³² whether direct access would “*appreciably* diminish any of [COMSAT’s] expense elements,”³³ or whether direct access would “*significantly* reduce the cost” to users.³⁴ The Commission did not quantify the

³⁰ NPRM, at 46.

³¹ 97 FCC 2d at 310. (Emphasis supplied).

³² 97 FCC 2d at 317. (Emphasis supplied).

³³ 97 FCC 2d at 318. (Emphasis supplied).

³⁴ 97 FCC 2d at 319. (Emphasis supplied).

potential cost savings which consumers might realize from direct access, probably for the same reasons that it makes no sense to attempt to do so in this proceeding. In today's competitive environment, *any* costs savings are welcome and characterizations which minimize the "significance" or "meaningfulness" of such savings should not be used as arguments for not moving forward promptly with direct access.³⁵

**C. The Commission Should Authorize Direct Access For
Noncompetitive And Competitive Markets**

In response to the Commission's inquiry as to whether direct access should be authorized for COMSAT markets that have been designated as competitive as well as non-competitive,³⁶ the Networks urge the Commission not to tie direct access authorization to present market power characterizations. While direct access presumably may have a more immediate dramatic effect in markets without any present competition, direct access should produce positive

³⁵ Even a casual reading of the 1984 Direct Access Order shows that the Commission focused principally on whether investment-based direct access (now called Level 4 access) should be implemented in response to the proposals put forward at that time. The Commission found investment access problematical. The Commission is not proposing, and the Networks are not advocating, Level 4 investment-based access in this proceeding. A principal reason why the Commission did not view direct access to be desirable at that time was its concern that AT&T, which utilized 90 percent of the space segment COMSAT then leased to the carriers "could in effect control investment decisions." 97 FCC 2d at 323-24. Again, this concern related directly to the Commission's focus on investment-based access mechanisms such as capitalized leases. In any event, AT&T's then dominance, which led the Commission to refer to it as occupying "a unique position" in the marketplace, is now diminished to the extent that the Commission has declared AT&T non-dominant in the international MTS market. Motion of AT&T to be Declared Non-Dominant for International Service, 11 FCC Rcd 17963 (1996).

³⁶ For example, with regard to the services of most interest to the Networks, full-time video is designated "competitive," while 142 occasional use video markets are designated as "non-competitive." COMSAT Corporation, File No. 60-SAT-ISP-97, released April 28, 1998, at paras. 13, 29, and 49.

benefits for all users of INTELSAT services by increasing the level of competition.³⁷ At present, the international communications marketplace is not in danger of having “too much competition.” The Networks would anticipate prices falling as a result of the availability of new competitive alternatives, even in markets the Commission has denominated competitive.

The Commission should not confuse the issue concerning how COMSAT should be regulated in competitive and non-competitive markets³⁸ with the question of whether Commission policy should be directed towards making non-competitive markets competitive and competitive markets even more competitive. The purpose of allowing direct access should be to make all markets more competitive.

**D. The Commission Possesses The Legal
Authority To Implement Direct Access**

In response to a legal analysis submitted by COMSAT in the COMSAT Non-

³⁷ The Networks previously have explained that they do not agree with the approach employed by the Commission in the COMSAT Non-Dominance proceeding whereby the mere existence of one other competitor in an overseas market (in other words, a duopoly) was deemed sufficient for that market to be declared competitive. See Comments of the Networks in Policies and Rules for Alternative Incentive Based Regulation of COMSAT Corporation, IB Docket No. 98-60, filed May 29, 1998, at note 4. In other contexts, the Commission has agreed that a duopoly does not necessarily create effective competition. First Report on CMRS, 10 FCC Rcd 8844, 8866-67 (1995) (citing DOJ and GAO conclusions).

³⁸ Regulatory oversight should be streamlined for competitive markets, while an appropriate “incentive regulation” regime, which minimizes the need for day-to-day tariff review and facilities regulation, may be fashioned for those that remain noncompetitive. The Networks have supported the implementation of an appropriate “price cap” regime for COMSAT’s noncompetitive markets that incorporates the following elements: (1) no pre-defined expiration period; (2) an aggressive downward adjustment to the price cap to account for productivity growth; and (3) a separate basket for occasional use video service. Comments of the Networks, IB Docket No. 98-60, May 29, 1998; Reply Comments of the Networks, IB Docket No. 98-60, June 12, 1998.

Dominant Proceeding,³⁹ the Commission has provided in the Notice an unusually comprehensive and persuasive analysis of its legal authority to implement direct access. The Commission addresses both COMSAT's principal argument that the Commission lacks authority under the Satellite Act to authorize direct access, as well as COMSAT's suggestion that such authorization raises constitutional issues under the Takings Clause of the Fifth Amendment because it would be deprived of its property without just compensation. It does not make sense to repeat here all the details of the Commission's legal arguments in which the Networks concur. Rather than duplicating what the Commission has done, the Networks will simply emphasize a few points which seem critical to the legal issues.

Most significantly, COMSAT's legal analysis, for the most part, assumes a form of direct access in which an entity other than COMSAT would be allowed to invest or otherwise take an ownership interest in the INTELSAT system. Thus, COMSAT cites various statutory provisions which it claims "establish COMSAT as the sole U.S. participant in INTELSAT."⁴⁰ Without conceding the point, the Networks are willing to grant that COMSAT might be on to something if the Commission had proposed to authorize Level 4 access. Then, the investment interest in INTELSAT implied by such access to ownership arguably might constitute "participation" in INTELSAT in the sense that the statute may reserve such participation to

³⁹ "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System," dated December 24, 1997, submitted by COMSAT in File No. 60-SAT-ISP-97.

⁴⁰ COMSAT Analysis, at p. 2. In this vein, COMSAT relies most heavily on the provision which states that "United States participation in the global system shall be in the form of *a* private corporation." 47 U.S.C. § 701(c) (emphasis usually added by COMSAT).

COMSAT. But, with regard to Level 3 access, COMSAT's arguments fall flat because it can point to no statutory provision which purports to restrict the Commission's authority to implement access for the purpose of contracting for service.

As the Commission points out, however, there is actually strong reason to believe that Congress did not intend the 1962 Satellite Act to restrict the Commission's authority to allow Level 3 direct access. When Congress passed the 1978 amendments to the Satellite Act, it designated COMSAT "as the *sole operating entity* of the United States for participation in INMARSAT, for the purpose of providing international maritime satellite telecommunications services."⁴¹ Obviously, Congress was aware that the Satellite Act provisions relating to COMSAT's participation in INTELSAT contained no such language designating COMSAT the "sole operating entity." It is a cardinal principle of statutory construction that "where Congress includes particular language in one section of the statute but omits it in another section of the same act, it is generally presumed that Congress acts, intentionally and purposely in the disparate inclusion or exclusion."⁴² Surely the Commission is correct in concluding that this contrasting approach shows that Congress did not give COMSAT exclusive access to the INTELSAT system for purposes of contracting for service (i.e., operating with INTELSAT), but at most intended to give it an exclusive role in system governance and ownership.⁴³

⁴¹ 47 U.S.C. § 752(a)(1) (emphasis supplied).

⁴² Rusello v. United States, 464 U.S. 16, 23 (1983); United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

⁴³ NPRM, at para. 29.

As for COMSAT's constitutional concerns, it goes without saying that they possibly might warrant more serious examination had the Commission proposed Level 4 access. With regard to Level 3 access, even assuming for the sake of argument that some form of "regulatory taking" occurs, which is not the case, customers will be required to compensate INTELSAT for the use of the INTELSAT satellites. COMSAT earns a fair return from INTELSAT (presently up to 21%) in connection with all the traffic attributable to INTELSAT's U.S. customers, whether or not COMSAT places the order. It's not as if the Commission is proposing to require INTELSAT to give away service and for COMSAT's investment in INTELSAT thereby to be diminished. As the Commission concludes, the fact that implementation of Level 3 access might diminish COMSAT's ability to earn additional *monopoly* rents does not deprive it of a reasonable opportunity to earn a fair rate of return on its INTELSAT investment.⁴⁴

Fundamentally, the Commission is correct that the Satellite Act does not create any exclusivity of access to INTELSAT satellites which vest COMSAT with property rights akin to those that might be negotiated between two parties. Instead, "[w]hat does exist is regulation of COMSAT."⁴⁵ Indeed, despite COMSAT's apparent suggestion that the Satellite Act somehow created expectations of exclusivity for COMSAT never to be altered, the very provision on which COMSAT most heavily relies states that COMSAT's participation in the global system shall be

⁴⁴ NPRM, at para. 43.

⁴⁵ NPRM, at para. 35.

“subject to appropriate governmental regulation.”⁴⁶ And, immediately following, Congress stated as a matter of policy that “all authorized users have nondiscriminatory access to the system” and that COMSAT be “operated as to maintain and strengthen competition in the provision of communications services to the public.”⁴⁷ Surely, these statements of Congressional purpose demonstrate that COMSAT has no legitimate expectation that Congress granted it a contract-like right of exclusivity, much less one beyond the reach of government regulation.

III. CONCLUSION

For the foregoing reasons, the Commission promptly should adopt its proposal to allow carriers and users to obtain Level 3 direct access to the INTELSAT system. Such action would promote the public interest by encouraging competitive alternatives in a U.S. market segment

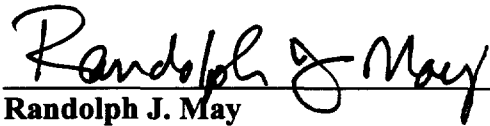
⁴⁶ 47 U.S.C. § 701(c).

⁴⁷ 47 U.S.C. § 701(c).

presently not subject to competition, and it would be consistent with a long line of Commission actions which have encouraged the development of competition in the international telecommunications marketplace.

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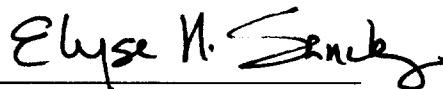
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